



REPUBLIC OF KENYA



KENYA LAW
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**Trans National Times Sacco Ltd v Kefa (Civil Appeal 44 of 2019)
[2024] KEHC 14089 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 44 OF 2019
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

TRANS NATIONAL TIMES SACCO LTD APPELLANT

AND

MOSES NGUTI KEFA RESPONDENT

RULING

1. Trans National Times Sacco Ltd, the Applicant herein, lodged an application by way of a Notice of Motion dated 26th September 2023. It was supported by the Affidavit of George Malava deposed to on a similar date. The application sought the following reliefs: -
 1. That the honourable court do issue an order reinstating this appeal against the Respondent and the same be fixed for hearing of this Appeal.
 2. That the costs be in the cause.
2. In the grounds in support of the application, the Applicant stated that, by consent, the appeal was withdrawn on mistaken belief that there would be no orders as to costs. However, the Respondent sought costs and filed a Bill of costs dated 17th February 2023.
3. The Applicant further stated that it filed an application seeking to strike out the Respondent's Bill of Costs on the basis of the mistaken belief that as a precondition of the withdrawal of the appeal, no costs were to be awarded to the Respondent.
4. It was its case that given the differing views of both parties, it would be in the interests of fairness that parties be heard and the misconceived consent set aside.
5. The Applicant filed written submissions dated 27th October 2023. Apart from reiterating the circumstances leading to the withdrawal of the suit as captured in its application, it was its case



that under Section 1A of the Civil Procedure Rules as appreciated with Article 159(2)(d) of *the Constitution*, this Court could reinstate the case to ensure the ends of justice are met.

6. Moses Nguti Kefa, the Respondent challenged the application through the Replying Affidavit of Majune Kraido, his Advocate on record, deposed to on 27th September 2023.
7. Learned Counsel deposed that the Appellant's suit in the lower Court had been filed before a Court without jurisdiction as it ought to have been instituted before the Cooperatives Tribunal. It was further argued that the Respondent's application to withdraw the appeal was, hence, voluntary and unilateral and that reinstating the appeal would serve no meaningful purpose because the appeal would, in any event, be eventually dismissed. He urged the Court to dismiss the application.
8. In its written submissions dated 7th December 2023, the Respondent was emphatic that the application had not met the threshold for reinstatement of the appeal.
9. The Respondent reiterated that the decision to withdraw was voluntary and unilateral and that the Respondent did not object to. It was submitted that reinstating the suit will serve no purpose since the suit was fatally defective.
10. The only issue for determination in the application is whether the application is merited.
11. The facts in this case are not in dispute. The Applicant herein instituted the appeal against the Respondent. However, through the Notice of withdrawal of Appeal dated 7th October 2022, it voluntarily withdrew the appeal.
12. The Applicant quest for reinstatement was triggered by the fact that the Respondent filed a Bill of Costs in the withdrawn appeal.
13. Order 25 of the Civil Procedure Rules 2010 provides for Withdrawal, Discontinuance and Adjustment of Suits. Order 25, Rule 1 allows the withdrawal of a suit by plaintiff in the following manner.

At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

14. The questions that arise, therefore, are what the law on reinstatement of suits is and in what instances a party is allowed to seek such orders.
15. Reinstatement of a suit of an exercise of Court's discretion. It is not a matter entitled to a party as of right. In *Shah -vs- Mbogo & Another* (1967) EA 116 the Court discussed the exercise of discretion as follows: -

The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

16. In *Priscilla Nyambura Njue -vs- Govhem Middle East Ltd East Africa Ltd; Kenya Bureau of Standards [Interested Party]* (2021) eKLR, a decision relied upon by the Respondent, the Court observed as follows: -

Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly



conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.

17. The foregoing decision fortifies the position that reinstatement is purely a Court's exercise of discretion. As said, the circumstances revolving around the quest for reinstatement are that the Applicant was aggrieved that the Respondent sought costs upon withdrawal of the appeal.
18. From the record, the Applicant voluntarily withdrew the appeal. The decision was not predicated on the condition that the Respondent would not pursue its costs.
19. Having keenly perused the proceedings of this Court of 12th October 2022, this Court enquired into the extent of the appeal's progress. Mr. Kraido, Learned Counsel for the Respondent indicated that they had filed written submissions and urged that the Respondent be granted the costs of the appeal upon withdrawal.
20. It is on the foregoing basis that the Court allowed the Respondent's withdrawal of the suit subject to an award of costs. Therefore, the Applicant's quest to reinstate the appeal on the ground that the Respondent subsequently filed a Bill of Costs cannot be a serious contention. The Applicant may consider pursuing an appeal since the award of costs was made upon this Court's consideration of the circumstances of the suit.
21. The Supreme Court in *Nicholas Kiptoo arap Korir Salat -vs- IEBC & 7 Others* discussed the issue of costs where a part withdraws a suit. It held as follows: -

.... A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. (emphasis mine)
22. Deriving from the foregoing, this Court finds that the circumstances in this matter do not favour the exercise of Court's discretion in favour of the Applicant. There are no cogent reasons as to why the withdrawal order be revised and set-aside.
23. In the premises, the Notice of Motion dated 26th September 2023 is without merit and is hereby dismissed with costs to the Respondent.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mondia for Mr. Karani, Learned Counsel for the Appellant/Applicant.

No appearance for Mr. Bikundo, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

